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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 10, 1987

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) has erroneously interpreted its statutory responsibility by creating presumptions favoring applicants and switching burdens of proof to non-applicants for proceedings to construct new facilities and provide new service.

2. Whether the FERC's adoption of the Optional Expedited Certificate Procedure (OECP) with its presumptions favoring applicants who wish to bypass existing utility service is supported by substantial evidence and reflects reasoned decision-making.

3. Whether the FERC has unlawfully abandoned its statutory responsibility by limiting its analysis of applications filed under the OECP.

4. Whether the OECP is ripe for review.

5. Whether the action of the FERC has interfered with the lawful exercise of state authority.

6. Whether state authority over transportation of gas to end users within a state must be clarified.

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PARTIES TO THE PROCEEDING

Air Products & Chemicals, Inc.
Alabama—Tennessee Natural Gas Company
American Bakers Association
American Gas Association
American Iron & Steel Institute
American Paper Institute
American Public Gas Association
AMOCO Gas Company
ANA Pipeline Company
Arco Oil & Gas Company
Arizona Electric Power Cooperative, Inc.
Arizona Public Service Company
Arkla, Inc.
Ashland Corporation
Ashland Exploration, Inc.
Association for Texas Intrastate Natural
Atlanta Gas Light Company
Baltimore Gas and Electric Company
Bethlehem Steel Corp.
Brooklyn Union Gas Co.
Brooklyn Union Gas Company
Cabot Corporation
Carolina Utility Customers Association
Cascade Natural Gas Corp.
Cenoco, Inc.
Central Illinois Light Co., et al.
Champlin Petroleum Company
Chemical Manufacturers Association
Chevron U.S.A., Inc.
Cities Service Oil & Gas Corporation
Citizen Energy Corp.
Citizens Energy Corp.
City of Willcox, Arizona
Coke Company
Columbia Gas Transmission Co.

Columbia Gas Transmission Corp.
Columbia Nitrogen Corp.
Consolidated Edison of New York, Inc.
Consolidated Gas Transmission Corporation
Consumer Power Company
CP National Corp.
Delhi Gas Pipeline Corp.
El Paso Natural Gas Company
Elizabethtown Gas Company
Extex, Inc.
Exxon Corporation
Fertilizer Institute
Florida Transmission Company
Foothills Pipelines
Gas Pipelines
Interstate Natural Gas Association of America
K. N. Energy, Inc.
Kerr-McGee Corporation
Laclede Gas Company
Louisiana Intrastate Gas Corp.
Marathon Oil Company
Maryland Industrial Group
Maryland People's Counsel
Memphis Light, Gas and Water Division
Mesa Operating Limited Partnership
Michigan Consolidated Gas Co.
Michigan Public Service Commission
Minnesota Public Utilities Commission
Mobil Oil Corporation
Monterey Pipeline Company
National Association of Regulatory Utility Commissioners
National Gas Pipeline Company of America
North Shore Gas Company
Northern Illinois Gas Co.
Northern Natural Gas Company
Northern Valley Environmental Council
Northwest Central Pipeline Corporation

Northwest Gas Company
Ohio Oil and Gas Association
Oklahoma National Gas Company
Pacific Gas and Electric Company
Pacific Gas Transmission Co.
Pan-Alberta Gas, Ltd.
Panhandle Eastern Pipeline Corporation
Panhandle Producers and Royalty Owners Association
Pennsylvania Public Utility Commission
Pennzoil Company, et al.
Phelp Dodge Corporation
Philadelphia Electric Co.
Phillips Petroleum Co., et al.
Piedmont Natural Gas Co.
Placid Oil Company
Power District and Gas Distributors Information Service
Process Gas Consumers Group
Producer's Gas Company
Public Service Electric and Gas Co.
Public Utilities Commission of the State of California
Salt River Project Agricultural Improvement
Shell Offshore, Inc.
Shell Western Electric and Paun, Inc.
Sohio Petroleum Company
South Jersey Co.
Southern California Gas Company
Southern Carolina Pipeline Corp.
Southern Indiana Gas and Electric Company
Southern Natural Gas Co.
Southern Natural Gas Company
State Corporation Commission, State of Kansas
State of Connecticut
State of Louisiana
State of Michigan
State of New York
Tenneco Oil Company
Tennessee Gas Pipeline Company

Tenngasco Corp.
Texas Exploration Corporation
Texas Gas Transmission Corporation
The Peoples Gas Light
Transok Inc.
Transwestern Pipeline Co.
Trunkline Gas Company
UGI Corp.
Union Oil Co., of California
Union Oil Company
United Distribution Companies
United Gas Pipeline Company
Valero Transmission Co.
Washington Gas Light Co.
Washington National Gas Company
Weirton Steel Corp.
West Coast Transmission Company Limited
West Virginia Consumer Advocate
Wisconsin Power & Light Co.

LIST OF SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Pacific Lighting Corporation

Dual Fuel Systems, Inc. (California)—Dissolution Pending
8309 Tujunga Avenue Corp. (California)
Pacific Center Downtown, Inc. (California)
Pacific Enterprises (California)
Pacific Library Tower (California)
Pacific Lighting Land Company (California)
Sabagli N.V. (Netherlands Antilles)
Southern California Tower (California)
Pacific Indonesia LNG Company (50%) (California)
Pacific Lighting Capital Company (Netherlands Antilles)
Pacific Lighting Gas Development Company (California)
Pacific Lighting Overseas Finance N.V. (Netherlands Antilles)
Pacific Synthetic Fuel Company (California)
Pacific Western Resources Company (California)
Southern California Conservation Financing Company (California)

Pacific Lighting Energy Systems (California)

Central Plants, Inc. (California)
Modular Products, Inc. (California)—Dissolution Pending
Pacific Energy Resources Incorporated (California)
Pacific Geothermal Company (California)
Pacific Hydropower Company (California)
Western Power, Inc. (Washington)
Pacific Lighting Bio-Energy Company (California)
Pacific Oroville Power, Inc. (California)
Pacific Penobscot Power Company (Maine)
Pacific Recovery Corporation (California)
Pacific Wood Fuels Company (California)

Pacific Interstate Company (California)

Pacific Gas Gathering Company (California)
Pacific Interstate Mojave Company (California)
Pacific Interstate Offshore Company (California)
Pacific Interstate Transmission Company (California)
Pacific Interstate Transmission Company (Arctic) (California)
Pacific Offshore Pipeline Company (California)

Pacific Lighting Leasing Company (California)

Pacific Lighting Commercial Loans, Inc. (California)

Pacific Lighting Oil and Gas Company (California)

Pacific Lighting Exploration Company (California)
Terra Resources, Inc. (Delaware)

Pacific Lighting Real Estate Group (California)

Presley ASW Finance Co., Inc. (California)
Presley Financial Corporation (California)
Presley-Home Mac Finance Co., Inc. (California)
Presley RAC Finance Co., Inc. (California)

Southern California Gas Company (California)

Pacific Lighting International Finance N.V. (Netherlands Antilles)
Southern California Gas International Finance N.V. (Netherlands Antilles)
Southern California Gas Tower (California)

Thrifty Corporation (California)

FTM Sports Corporation (50%) (California)
American Diversified Sports, Inc. (80%) (Florida)
Gart Bros. Sporting Goods Company (Colorado)
Colorado Wholesale Sporting Goods Co., Inc. (Colorado)
Sports Castle Travels, Inc. (89%) (Colorado)

Michigan Sporting Goods Distributors, Inc. (Michigan)
Rexall Square Drugs, Inc. (California)
The Newman Importing Company, Inc. (California)
Thrifty Jr. Inc. (California)
Thrifty Realty Company (California)
Thrifty Wilshire, Inc. (California)
United Merchandising Corp. (California)

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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Southern California Gas Company ("SoCalGas") respectfully petitions this Court for review of a decision of the United States Court of Appeals for the District of Columbia Circuit affirming portions of Order No. 436, *et seq.*, ("Order No. 436") of the Federal Energy Regulatory Commission ("FERC" or "Commission").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 824 F.2d 981 (D.C. Cir. 1987) and is reproduced in the Appendix to this Petition (App. B). The Orders of the FERC are reported as follows:

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol (Order No. 436), 50 Fed. Reg. 42,408 (Oct. 18, 1985), [Reg. Preambles 1982-1985] FERC Stats. & Regs.

¶30,665 (Oct. 9, 1985), *modified,* Order No. 436-A, 50 Fed. Reg. 52,217 (Dec. 23, 1985), [Reg. Preambles 1982-1985] FERC Stats. & Regs. ¶30,675 [Dec. 12, 1985], *modified further,* Order No. 436-B, 51 Fed. Reg. 6398 (Feb. 24, 1986), III FERC Stats. & Regs. ¶30,688 (Feb. 14, 1986), *reh'g denied,* Order No. 436-C, 34 FERC ¶61,404 (Feb. 14, 1986), *reh'g denied,* Order No. 436-D, 34 FERC ¶61,405 (Mar. 28, 1986), *reconsideration denied,* Order No. 436-E, 34 FERC ¶61,403 (Mar. 28, 1986).

JURISDICTION

The order of the Court of Appeals was issued June 23, 1987, and entered following a denial of timely petitions for rehearing and suggestions for rehearing en banc on September 15, 1987. (App. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1), 2101(c), and 2350 (1982).

STATUTES INVOLVED

The principal statutory provisions involved are Sections 1(b), 7(a), 7(c), 7(e), 19(b) of the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§717(b), 717f(a), 717f(c), 717f(e), 717(r), Section 311, Natural Gas Policy Act, 15 U.S.C. Section 3371, and Section 4 of the Administrative Procedure Act, 5 U.S.C. §553.

STATEMENT OF THE CASE

This case involves orders of the FERC which "envisage a complete restructuring of the natural gas industry." (App. B-17.) Included within the FERC Order is a procedure and

substantive presumption which, unless vacated or revised, will negate a 50-year policy which fairly recognized the statutory division of responsibility concerning the regulation of natural gas between the states and federal agencies, and which arrogates to the FERC a disproportionate and unintended share of this economic power.

On May 30, 1985, the FERC issued a Notice of Proposed Rulemaking ("NOPR") which "proposed significant changes to our regulation of natural gas pipeline companies in light of the many changes in the natural gas industry over the years." The NOPR proposed a package of four interrelated parts. A simplified "blanket" transportation program was proposed to replace existing self-implementing transportation programs under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, and Section 311 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3371. The FERC also proposed to allow interstate pipelines to obtain expedited certificates enabling them to construct and operate new facilities and offer certain new services. This Optional Expedited Certificate Procedure ("OECP") provided for minimal regulatory review and an automatic presumption that the proposal was in the public interest if the applicant complied with limited conditions concerning the economic risk of the venture. The Commission also initially proposed certain treatment for take-or-pay contract settlements and to segment purchased gas costs into blocks to place downward pressure on gas prices.

The final rule retained the transportation program, eliminated the take-or-pay program, and deferred the block billing proposal. The final rule promulgated the OECP but provided an additional notice requirement in the event the proposal included "bypass" of a local distribution company ("LDC").

The Circuit Court vacated and remanded Order No. 436 for reasons related to provisions of the transportation program and for failure to deal with take-or-pay problem contracts. As to the OECP, the Circuit Court notes the concern of LDCs and

state commissions that the OECP would facilitate pipelines in bypassing LDCs to serve attractive customers.

The Circuit Court finds that the OECP was not ripe for review since no application had raised the problem with the FERC, the Court would be issuing an advisory opinion, and, petitioners had not shown any hardship if the OECP was not adjudicated now.

As to the substance of the proposal, the Circuit Court rejects arguments that failure to consider the waste in duplicative facilities and the adverse impact on customers of bypassed LDCs' invalidates the presumption favoring applicants. Particularly, the Circuit Court justifies the OECP in that the applicant pipeline bears some risk of loss, that construction seems likely only where wasteful investment seems remote, and that state regulatory commissions can keep the impact slight and protect consumers. The Circuit Court noted the possibility of concurrent state regulation over bypass transportation and endorsed the ability of state commissions to protect consumers.

Judge Mikva concurs with the vast majority of the opinion but dissents as to the impact of the OECP on the grounds that it may prevent state commissions from providing "affordable energy for their residents" and the ease it will provide pipelines to bypass LDCs.

SoCalGas, among others, sought rehearing of the Circuit Court opinion limited to its upholding of the OECP. Rehearing, however, was denied.

REASONS FOR GRANTING THE WRIT

In evaluating applications to construct facilities or provide new services, the FERC is obligated to make certain public interest findings, to evaluate all aspects of the application, and to consider the impact of the proposal on the consuming public. In that regard, the FERC and the NGA have required the

applicant to bear the burden of proof and, in cases involving the bypass of an LDC, the FERC and the Courts have established a presumption favoring service to all end users by the existing LDC.

The opinion below upholds the substance of the OECP and finds the procedure not ripe for review. By doing so, the Circuit Court condones the creation of a new presumption favoring an applicant wishing to bypass the LDC and transferring the burden to the opponent of an application.

In reinterpreting its statutory responsibility, the FERC also proposes to restrict its consideration of an application, under the OECP, to limited and direct economic considerations. The FERC relies on state commissions to protect consumers from the impact. State authority to regulate such transactions, however, has never been defined and may not, in fact, exist.

Thus, the FERC is vacating an area it has traditionally regulated, created a possible regulatory gap, abolished an historic preference for LDC service to consumers, and failed to describe or investigate the ability or inability of the states to fill the gap.

Review by this Court is thus warranted.

I

THIS COURT SHOULD REVIEW TO CORRECT THE FERC'S ERRONEOUS AND UNSUPPORTED INTERPRETATION OF ITS STATUTORY RESPONSIBILITY

Under the Natural Gas Act (NGA), the FERC is obligated to find that any construction or operation of facilities, transportation or sale of natural gas in interstate commerce "is or will be required by the present or future public convenience

and necessary." 15 U.S.C. § 717f(c) and f(e). This duty "requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Company v. Public Service Commission (CATCO)*, 360 U.S. 378, 391 (1959); *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961). And, no attempt should be made by the agency "to sweep aside the critical safeguards that are embodied in its certification process." *Consumer Federation of America v. FPC*, 515 F.2d 347, 356 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 906 (1975).

In making its public interest finding, the FERC is required to consider the competitive consequences of the proposed new service or facility, *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985) *(MPC I); Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985) *(MPC II);* and *Maryland People's Counsel v. FERC*, 768 F.2d 450 (D.C. Cir. 1985) (*MPC III*), the possibility of alternatives to the application even if not raised by any protest, and to consider the "reasonably foreseeable future" of the project, *City of Pittsburgh v. FPC*, 237 F.2d 741, 752 (D.C. Cir. 1956). Such a finding must include consideration of the indirect effects of a proposed new service on the ultimate consumers of gas who are the FERC's "prime constituency." *MPC II* at 781. The FERC is not entitled to rest on the record developed by the parties to the proceeding, but must "[act] affirmatively in order to make a complete record." *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 621 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

In adopting the OECP, the FERC turns its back on all of these requirements. As detailed in the Circuit Court opinion, the FERC does not propose to look at any element of an application under the OECP to construct facilities or provide new service which may bypass an LDC except elements detailed in the new regulations. 824 F.2d at 1030, 1031 (App. B-94, 95). These elements relate exclusively to potential financial risk borne by the pipeline applicant. The FERC does not intend to review the impact to others or alternatives to the proposal.

The FERC cannot unilaterally decide to limit its analysis to only two issues; was the customer free contractually to seek bypass, and, did it benefit that customer individually. All other issues cannot be ignored as the FERC has done in approving an OECP application to bypass an existing LDC. *American Distribution Company (Alabama Division)*, 37 FERC ¶61,282 (1986). The "public interest" may not coincide with the interests of the bypassing pipeline and its industrial customer.

The FERC's new policy conflicts with past FERC and court decisions referring to the "long-established" and "well-established" FERC policy "to favor service to industrial customers by local distributors," as opposed to direct pipeline sales or transportation. *See, e.g., Missouri Edison Co. v. FPC*, 479 F.2d 1185 (D.C. Cir. 1973).

Unlike Section 3 of the Natural Gas Act, 15 U.S.C. §717b, the burden of proof concerning the public convenience and necessity under Section 7(c) rests clearly with the applicant. Recently the author of the opinion below noted this fact in upholding the use of rebuttable presumptions pursuant to Section 3. *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration*, 822 F.2d 1105 (D.C. Cir. 1987). Unfortunately, this important distinction was not considered in the instant opinion. Indeed, as discussed later, the circuit court opinion provides for a conclusive presumption favoring the applicant as part of a blanket program (OECP) pursuant to Section 7.

The opportunity for specific review of bypass applications which consider all relevent factors is all petitioner seeks. The policy against bypass has never guaranteed distributors that bypass proposals would not be permitted by the Commission in every case, and the preference for service by an LDC would not necessarily apply if case-by-case economic considerations precluded it. *See, e.g., Northern Natural Gas Company*, 33 FPC 501 (1985), and, *Panhandle Eastern Pipe Line Company*, 29 FERC ¶61,338 at 61,709-10 (Dec. 26, 1984). Thus, bypass of an LDC is not favored but may be granted if, after a review of

the facts and relevant policy, the FERC determines that the proposed service would be in the public interest. It has been the traditional and necessary approach of the FERC, mandated by the NGA, which the OECP now drastically alters.

The Circuit Court states that the historic policy disfavoring LDC bypass has been only "the concern over the wasteful construction of duplicative facilities." 824 F.2d at 1038 (App. B-112). To the contrary, the most often cited reason against bypass is the extent to which the loss of large industrial customers of the LDC shifts costs to its remaining customers, particularly captive, small customers. *American Louisiana Pipe Line Co., et al.*, 20 FPC 575 (1958). Other factors supporting the policy against bypass include the fact that LDCs and their ratepayers, as the original pipeline customers, paid most of the cost of construction and maintenance of the facilities and should have a superior right to the pipeline's limited capacity, *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467, 472 (3d Cir. 1956), *cert. denied*, 352 U.S. 891 (1956), and, that LDC service, as opposed to pipeline or producer direct service, is subject to greater regulatory supervision.

In neither of the two Notices of Inquiry issued by the Commission in Docket No. RM85-1-000 was the issue of bypass of local distributors, or the Commission's historical policy against such bypass, directly mentioned. Even the NOPR failed to mention this long-honored FERC policy. The Administrative Procedure Act, 5 U.S.C. §553, requires that the agency notice must contain the substance of the proposed rule and may require a description of the issues involved. Failing to mention such a major change to a cornerstore of FERC regulation was inexcusable.

Courts have repeatedly recognized that "the Federal Energy Regulatory Commission 'bears the burden of explaining the reasonableness of any departure from a longstanding practice . . .'" *Public Service Commission of New York v. FERC*, 642 F.2d 1335, 1346 (D.C. Cir. 1980), *cert. denied*, 454

U.S. 879 (1981). The FERC and the Circuit Court, however, fail to give reasoned decisions for the abandonment of the long-standing policy, as pointed out in the dissenting opinion of Judge Mikva on this issue. They can only vaguely refer to FERC's "overall reasoning" for support. 824 F.2d at 1038 (App. B-112). Such a major change requires more support than "overall reasoning" — it needs detailed findings reflecting reasoned decision-making.

II

THE PROCEDURE ESTABLISHED FOR OPTIONAL EXPEDITED CERTIFICATES IS RIPE FOR REVIEW

The OECP, as adopted by the Commission and now approved by the Circuit Court, is ripe for review. The procedure would allow a bypass application to be approved, no matter how unwise and unsupported, as long as the pipeline complies with the new regulations showing that it may bear certain economic risks associated with its own investment. The presumption operates to foreclose all scrutiny of the individual certificate application beyond its compliance with the stated objectives.

To receive a hearing, LDCs and state commissions must raise material issues of fact. These facts must be in addition to arguments concerning the negative impact to the LDC and its customers no matter how devastating. The Circuit Court notes that while the outcome is not necessarily automatic, the FERC "significantly circumscribes its discretion". 824 F.2d at 1032 (App. B-98, 99).

Such material facts must be gleaned from the little information contained in the FERC's notice of the filing and the abbreviated application. No discovery is allowed to determine the impact or defects prior to an FERC order. The protest itself, therefore, is both the first and the last opportunity the adversely affected parties will have to establish their legal and

factual arguments. As stated bluntly in the Notice of Proposed Rulemaking (NOPR), "[t]he protestor shall carry the burden of proof in demonstrating that certification of the proposed activities would not be in the public convenience and necessity." This is despite the fact that the NGA places such a burden firmly on the applicant. 15 USC § 717f(c).

As a practical matter, dismissal by the FERC of the major concerns of LDCs and state commissions as irrelevant makes the "rebuttable" presumption conclusive as to them. Adoption of such a conclusive presumption underscores the ripeness of the issue. Petitioner does not wish to prevent competition; it only desires a meaningful opportunity for a hearing to review *all* the impacts of an application before the FERC makes its decision.

The Circuit Court cites the lack of record evidence to indicate that industrial customers wish to bypass LDCs and that petitioners cannot point to "the slightest hardship." 824 F.2d at 1033 (App. B-102). Due to the long-standing FERC policy against bypass, no such record could be established nor did the FERC even try at that time to establish a record on this point. However, since the issuance of the program and the presumption in favor of bypass, the construction of bypass pipelines and pipeline direct service to industrials has become a constant and disheartening problem for the states and the LDCs. Since the recent inception of this program, many OECP applications have been filed. Some involve minor projects but others involve the construction of hundreds of miles of facilities costing hundreds of millions of dollars. See, *e.g.*, *Iroquois Gas Transmission System*, 51 FR 23267 (June 20, 1987). One OECP application proposes to bypass LDC service through a 1,000-mile-long-pipeline estimated to cost over $665 million. *Wyoming-California Pipeline Co.*, 52 FR 32337, 8 (Aug. 27, 1987). The OECP is significant, substantial, and must be reversed before irreparable damage is done.

III

THIS COURT SHOULD REVIEW TO CLARIFY THE SCOPE OF STATE JURISDICTION OVER TRANSPORTATION WITHIN ITS BOUNDARIES

This Court has noted that the NGA was intended to supplement rather than supplant state regulation. *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). The House Report to the NGA states that the NGA "takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority". H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937). *See also; Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947).

Key to the Circuit Court's opinion is that the FERC can safely avoid considering impacts to the states, the affected LDC, and the other gas consumers in the state, because the states have the ability to react meaningfully to bypass. 824 F.2d at 1035 (App. B-105). The opinion suggests that the states may exert some sort of certification authority, citing *Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission*, 341 U.S. 329, 336 (1951), or utilize its taxing power to mitigate the impact. 824 F.2d at 1035 (App. B-106). The opinion further, however, declines to rule on the extent of state authority as not in issue or as "too hypothetical". 824 F.2d at 1035, 1037 (App. B-104-106, 109-111). If it is later found that the states lack the authority to take the suggested actions or exert the proposed jurisdiction, then the FERC has created a situation where states and affected LDCs can neither meaningfully complain to the FERC nor take preventive action within the states. That is, if the FERC does not regulate, no one will or can.

There is no record in this proceeding concerning the extent or existence of state authority to address the transportation of natural gas for consumption within a state once it crosses its boundaries nor the ability of such jurisdiction to protect consumers and the public interest. The FERC did not even

attempt to develop such a record. The FERC and the Circuit Court apparently believe that the states can regulate all local concerns. 824 F.2d at 1035 (App. B-106). However, the mere statement by the FERC, and the Circuit Court's implied agreement, that "the states have ample authority to regulate interstate pipelines services that bypass distributors" is not enough. Either this Court must direct the FERC to continue to consider all impacts of bypass on consumers or it must affirm and detail state jurisdiction. Otherwise, a regulatory gap will exist where Congress intended there be none.

The Circuit Court relies on two opinions of this Court for the existence of state authority. *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507 (1947); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951). Those cases do establish that the states may regulate the price at which gas is *sold* by interstate pipelines to end use customers, and that state-level certificates for certain facilities in a bypass proposal may be required, but they do not address *transportation*. Transportation, however, is exactly what the entire FERC Order was intended to foster.

Even if the states can legally regulate bypass to protect the public interest, the FERC has traditionally carried out this responsibility. *See, e.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *ANR Pipeline Company*, 34 FERC ¶61,238 (Feb. 20, 1986); *Transwestern Pipeline Company*, 36 FPC 176 (1966). The Commission cannot simply vacate the area without so much as an inquiry into the extent of actual, parallel state regulation. Many state statutes do not provide for regulation of bypass situations (Reply Brief of Associated Gas Distributors, *et al.*, at 5-6), and municipal utilities generally are not subject to state utility commission jurisdiction.

The FERC argues that "where transportation bypass is concerned there is 'a point in time and space' where federal

authority ends and state authority begins." FERC Br. at 162. The Circuit Court decision should be modified to specifically adopt this principle and clarify that state authority, where asserted, exists to enable a state to regulate local distribution and transportation from that "point in time and space" to the end user. As required by Section 1(b) of the NGA, 15 U.S.C. § 717(b), the state thus retains the ability to regulate matters of essentially local concern. *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). This authority of the states applies to "any other transportation or sale. . . or to the local distribution . . . or to the facilities used for such distribution. . ." Section 1(b), Contrarily, the FERC itself, in the context of a bypass proposal, recently indicated that it believes its transportation jurisdiction over pipelines is comprehensive, *ANR Pipeline Company,* 34 FERC ¶61,238, 61,412 (Feb. 28, 1986), including where the application is under the OECP and the Commission has severely restricted its review. *Wyoming-California Pipeline Co.,* 41 FERC ¶61,040 (October 20, 1987). Thus, the FERC wishes to withdraw from exercising its authority but concurrently wishes to prevent state commissions from filling the void or exercising their constitutional authority over "any other transportation" and the "local distribution" of natural gas.

Cases construing the bounds of state vs. federal jurisdiction have repeatedly stressed that Congress intended to leave no "regulatory gaps" and that, if a question arises as to jurisdiction over an area which would be difficult for the individual states to regulate, the federal agency is assumed to have been entrusted to regulate it. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 at 28. *See also; Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi,* 474 U.S. 409 (1986). Thus, if the FERC only considers the limited OECP criteria, it is turning its back on the public interest with impunity unless this Court sets aside the Circuit Court determination on this issue or affirms the full extent of state authority.

Further, reference to the taxing power of a state as a remedy to the rate implications of a bypass situation is similarly misguided. 824 F.2d at 1035 (App. B-107). The states will have difficulty taxing any transaction which exclusively involves the interstate transportation of natural gas. *Maryland v. Louisiana,* 451 U.S. 725 (1981). It is difficult to conceive of an example where a tax to mitigate the impact of the bypass transaction would be appropriate or adequate.

IV

THIS COURT SHOULD REVIEW TO PREVENT THE FERC FROM INTERFERING WITH THE LAWFUL EXERCISE OF STATE AUTHORITY

The OECP and its substantive presumption in favor of bypass applications will force the states to modify rate policies or enact new legislation concerning the regulation of the distribution of natural gas for consumption, an area protected from FERC interference by Section 1(b) of the Natural Gas Act. 15 U.S.C. §717(b). The Circuit Court proposes that states face a choice between injuring LDC shareholders, driving industrial customers off the LDC system, or shifting costs to residential consumers. 824 F.2d at 1038 (App. B-110, 111). The states are thus no longer free to develop local policies for the distribution and consumption of gas that do not complement the FERC's new policy. (App. B-126, 127.)

The FERC should, at a minimum, be required to evaluate the impact to all affected groups before making a determination to issue a certificate of public convenience and necessity. Rejecting the OECP does not defeat competition or prevent bypass, it only insures that all essential impacts are evaluated and unwise bypass is identified through complete procedures.

The OECP promotes bypass thereby promoting a segmentation of the gas consumers market analogous to that found

unlawful in the *MPC* cases. When pipelines bypass more and more of an LDC's industrial load, it leaves the small, non-fuel-switchable residential and commercial customers to be served by the LDC. This impact of bypass is not disputed. However, the FERC has stated that policy and factual objections to bypass concerning market distortions caused by an OECP proposal, are foreclosed from consideration, effectively eliminating review of proposals opposed by LDCs or state commissions.

The FERC's support for reduced regulation and competitive forces of the marketplace is commendable. If such actions include abdication of NGA obligations, Congressional action is necessary to relieve the FERC of its responsibilities and the FERC cannot abdicate without such Congressional action. *See, e.g., FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir.), *cert. denied* 469 U.S. 1034.

The Circuit Court further rejects the distinct differences between an LDC's obligation to serve all who desire service, big or little, and that of a bypassing pipeline planning to serve only a select few major customers. The bypassing pipeline under the OECP has no obligation to provide service beyond those it voluntarily assumes. The "raider" simply assumes a potential bypass cost risk and reaps the benefits. In stark contrast, an LDC has an ongoing statutory obligation to serve all new or returning customers desiring service.

Finally, the Circuit Court concludes that only "economic" bypass will occur. All bypass is economic for someone. It may, however, be a disaster to residential and small commercial customers. The impact to all affected consumers and companies is fundamental to determining the true economics. The FERC proposes to look at only one segment of the bypass which is most likely to show "economic benefit" but to ignore those who are certain to suffer and whom the FERC is directed to protect. *CATCO, supra* at 391.

IV

CONCLUSION

This Court should issue its Writ of Certiorari to review the decision of the court below.

Dated: December 10, 1987 Respectfully submitted,

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